BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc.	)	
for Forbearance Under 47 U.S.C. § 160(c) From	)	WC Docket No. 04-405
Application of *Computer Inquiry* and Title II	)	
Common-Carriage Requirements.	)	
	)	

COMMENTS OF THE CALIFORNIA ISP ASSOCIATION, INC. IN RESPONSE TO THE PETITION OF BELLSOUTH TELECOMMUNICATIONS, INC. FOR FORBEARANCE

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DAVID A. SIMPSON
ANDREW ULMER
SIMPSON PARTNERS LLP
900 Front Street, Suite 300
San Francisco, CA 94111
Telephone: (415) 773-1790
Facsimile: (415) 773-1791

Attorneys for the
California ISP Association, Inc.

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PETITION FOR FORBEARANCE

I. INTRODUCTION

Pursuant to 47 C.F.R. § 1.419 and consistent with the timeframe established by the Federal Communications Commission ("FCC") in its November 3, 2004 Public Notice, the California ISP Association, Inc. ("CISPA") submits these comments in response to the Petition for Forbearance filed by BellSouth Telecommunications, Inc. ("BellSouth") regarding incumbent local exchange carrier ("ILEC") provision of broadband services. CISPA is an association of over 100 Internet Service Providers ("ISPs") operating in California.[1] CISPA estimates that its constituent members serve millions of end user customers in California. Many of CISPA's members purchase Digital Subscriber Line ("DSL") services from ILECs or their affiliates in California. In its Petition, BellSouth has requested that the FCC forbear from applying Title II common carriage requirements[2] and *Computer Inquiry*[3] rules to certain advanced services,

[1] For more information about CISPA, please see www.cispa.org.
[2] 47 U.SC. Section 201 *et seq.*
[3] 28 F.C.C.2d 267 (1971); 77 F.C.C.2d 384 (1980); and 14 FCC Rcd 4289 (1999).

including DSL. BellSouth's Petition should be denied. BellSouth's request for relief extends to all ILECs, including those operating in California. If granted, BellSouth's petition would amount to a regulatory license for ILECs and their affiliates to engage in anti-competitive conduct in how they configure their networks and offer, if at all, DSL and other advanced services to independent ISPs. At stake in this proceeding is the ability of local, independent ISPs across the United States to continue to provide their customers with high-speed Internet access via DSL.

II. REQUEST FOR RELIEF

CISPA requests that the FCC deny BellSouth's Petition for Forbearance and caution ILECs that the FCC will not entertain similar petitions.[4]

III. ARGUMENT

A. BellSouth's Petition Mischaracterizes the Relevant Market

In its Petition, BellSouth seeks forbearance from statutory requirements and regulations as they apply to "broadband" services, which include high-speed Internet access provided using DSL.[5] DSL is available over existing telephone lines, which in California connect virtually all business and households. At this time, similar ubiquitous networks do not exist for cable or wireless services in California. Cable networks do not generally serve business districts in California[6] and wireless services do not in all cases provide the coverage or the level of reliability that customers demand.

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[4] CISPA notes other ILECs have submitted similar petitions for forbearance from common carrier obligations. *See e.g.* Petition of SBC Communications, Inc ("SBC") for Forbearance, WC Docket No. 04-29 and Petition of Qwest Corporation for Forbearance, WC Docket No. 04-416.

[5] Petition at p. 1, fn. 1.

[6] Contrary to BellSouth's assertions (BellSouth Petition at p. 10), DSL may be the only means for small businesses to obtain reliable high-speed access to the Internet and other information services at affordable prices.

The relevant market for purposes of considering BellSouth's Petition is not a general "broadband" market, but a market in which ISPs provide end use customers high-speed Internet access via DSL.[7] This market has been specifically recognized by ILECs in connection with their own investor briefings.[8] DSL is distinguishable from other service platforms used to connect to the Internet because it is always on and allows many users in the same geographic area simultaneous access without compromising the speed or quality of the transmission. In addition, current DSL pricing makes DSL more attractive than other service platforms for high-speed Internet access. This benefit will likely disappear without a competitive marketplace amongst ISPs in the provision of high-speed Internet access via DSL. The FCC's goal should be to prevent anti-competitive behavior in this market to ensure that end users have the option to obtain high-speed Internet access from the ISP of their choice. The relief BellSouth seeks threatens this market because it would permit BellSouth and other ILECs to configure their networks and impose terms and conditions that would preclude independent ISPs from offering DSL to their end use customers.

B. The Requirements for Forbearance Have Not Been Met

The statutory requirements of the Communications Act of 1934, as amended, and related regulations are necessary to protect the public interest. In this case, Title II common carriage requirements and *Computer Inquiry* rules serve an important purpose. Their purpose is to prevent discrimination and require the ILECs to continue to make

[7] There is also a wholesale market in which ISPs purchase necessary telecommunications services to provide end use customers with high-speed Internet and information services. Bellsouth and other ILECs are the primary wholesale providers in this market.

[8] *See e.g.* SBC Investor Briefing dated October 21, 2004 in which SBC highlights the number of DSL lines it has added and claiming to be "No. 1 among major U.S. telecommunications providers." A copy of SBC Communications' Investor Briefing can be found at the following url: http://www.sbc.com/Investor/Financial/Earning_Info/docs/3Q_04_IB_FINAL.pdf

their networks available to ISPs. Without these safeguards, ISPs (often small companies serving local areas) have no assurance that they will continue to have access to ILECs' networks. ILECs would be able to leverage their control of the local exchange marketplace and exchange access facilities for anticompetitive purposes in the provision of information services via DSL.

In its Petition, BellSouth argues that the requirements for forbearance have been met.[9] They have not. The criteria for forbearance require the FCC to make the following determinations:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[10]

(i) Forbearance Will Not Promote Competition

BellSouth asserts that competition and not regulation is the best means of ensuring that charges, practices, and classifications associated with telecommunications services are just and reasonable.[11] Here, the relevant inquiry should be the existence of competition in the market for high-speed Internet and information services via DSL. At present, this market can hardly be deemed competitive. ILECs initially courted independent ISPs to gain information about the information services market, but have

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[9] 47 U.S.C. § 160.
[10] 47 U.S.C. § 160(a).
[11] BellSouth Petition at pp. 17-20.

since engaged in anti-competitive conduct against independent ISPs. Nevertheless, independent ISPs continue to struggle in this market to compete with ILEC-affiliated ISPs. In many instances, ISPs have only one choice of vendor to obtain DSL services to provide high-speed Internet access and other information services to their end use customers, namely the ILEC. At the same time, independent ISPs must compete with an ILEC–affiliated ISP that is already receiving preferential treatment as an ILEC wholesale customer. Granting BellSouth's petition would do nothing to change this fact; it would only compound the existing harm independent ISPs are experiencing as a result of having to compete in the retail market with their own wholesale vendor.

BellSouth argues that other modes of "broadband" services are available. Here BellSouth appears to argue that ISPs can obtain facilities to provide high-speed information services from other sources. For example, BellSouth asserts that cable providers are entering into private carriage arrangements with independent ISPs.[12] This is certainly not the case in California. ISPs operating in California do not have access to cable networks in order to provide high-speed Internet access. However, assuming for sake of argument that they did, cable networks do not have the ubiquitous footprint of the ILECs' wireline networks and in most cases do not reach business locations. With respect to wireless, satellite and broadband over power line solutions, these services are presently not comparable to DSL's availability, reliability, speeds, characteristics, pricing points and separate and distinct customer demand. In addition, local, independent ISPs do not have access to satellite and broadband over powerline facilities in California.

In the case of wireless, ISPs are required to invest a significant amount of resources to build-out their own networks. As more ISPs enter this market, network

[12] *Id.* at p. 32.

performance and reliability become more prevalent issues, which clearly distinguish wireless from DSL. Moreover, at this time, there is simply not enough wireless spectrum available to serve any density of wireless customers in metropolitan areas. Until the wireless technology improves and more spectrum is available, high–speed Internet access via wireless is not a viable substitute for DSL.

Although CISPA strongly supports wireless deployment, CISPA does not support a regulatory framework that results in a limited number of independent ISPs operating only in the wireless spectrum. Independent ISPs should be assessed that they will retain access to the ILECs' wireline networks to provide high-speed Internet access via DSL. By granting BellSouth's Petition, the FCC would be deterring competition in this market and encouraging the ILECs and their own ISP affiliates to become the sole source of information services provided by DSL.[13] This outcome would diminish the diversity of information services available to end use customers and ultimately lead to higher DSL prices, thereby harming consumers.

(ii) Forbearance Will Not Protect Consumers

In its Petition, BellSouth argues that Title II common carriage requirements and the *Computer Inquiry* rules are not necessary to protect consumers. In the DSL context, consumers are both (a) ISPs that purchase DSL from the ILECs and (b) end use customers of those ISPs. Independent ISPs have and continue to rely on sufficient regulatory oversight to protect them and their customers from anti-competitive conduct

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[13] BellSouth suggests that Title II common carriage requirements and the Computer Inquiry Rules discourage infrastructure investment in violation of Section 706 of the Telecommunications Act of 1996. (BellSouth Petition at pp. 16-17.) Title II requirements and the *Computer Inquiry* rules have not impeded the ILECs' deployment of DSL networks; they have only placed restrictions on ILECs excluding independent ISPs from their networks.

by ILECs in the provision of DSL and other advanced services. Without sufficient regulatory safeguards, BellSouth and other ILECs would be free to exclude independent ISPs from obtaining DSL, through unreasonable pricing, onerous terms and conditions, or simply refusing to sell DSL to independent ISPs. BellSouth argues that the ILECs lack market power and therefore cannot charge unjust or unreasonably discriminatory rates.[14] This is categorically untrue. BellSouth and other ILECs wield monopoly power in the provision of local exchange service as well as DSL. As explained above, in many instances, DSL is the only form of high-speed Internet access available to customers, and ISPs must purchase DSL from ILECs if they wish to compete with ILEC-affiliated ISPs. ILECs have consistently charged independent ISP wholesale prices for DSL that are unjust and unreasonable when compared to the retail price at which an ILEC-affiliated ISP offers Internet access via DSL.[15] As a result, the FCC must impose adequate safeguards to protect independent ISPs from discrimination and deter preferential treatment for ILEC-affiliated ISPs. At present, the FCC is not doing enough to ensure a competitive DSL market. Forbearance will only magnify problems that currently exist for independent ISPs seeking to obtain fair and nondiscriminatory access to ILECs' networks to serve end use customers.

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[14] BellSouth Petition at p. 31.

[15] ILEC affiliated ISPs already receive unduly preferential treatment from ILECs in the form of bundled products, joint marketing, billing services and pricing. For example, SBC Yahoo DSL is currently offering a DSL promotional rate of $19.95 per month (with a free $99 modem) for SBC California telephone customers. The lowest DSL wholesale rate currently available for independent ISPs from SBC Advanced Solutions, Inc. is $18 per month. This promotion creates an unreasonable price squeeze on independent ISPs attempting to offer DSL to end use customers on a stand-alone basis.

(iii) Forbearance is Not Consistent with the Public Interest

In its Petition, BellSouth argues that granting forbearance from Title II common carriage requirements and *Computer Inquiry* rules will advance the public interest.[16] BellSouth asserts, among other things, that forbearance will help achieve ubiquitous availability of DSL, allow ILECs to operate in a minimal regulatory environment thus encouraging investment and innovation, and create a rational regulatory framework for competing services.[17] Forbearance will not accomplish these goals. Instead, forbearance will foster anticompetitive conduct as described in Section III.C below.

With respect to BellSouth's arguments, regulation has not deterred the ILECs' efforts to market and provide DSL services to the public on behalf of their affiliated ISPs. In truth, the goal of achieving ubiquitous DSL would be further advanced if ILECs were required to provide independent ISPs a reasonable wholesale model so that ISPs could provide end use customers with high-speed Internet access. Here, forbearance will not create a rational regulatory framework for independent ISPs attempting to compete with ILEC-affiliated ISPs in provisioning high-speed Internet access via DSL. Instead, forbearance will provide a tool for ILECs to exclude independent ISPs from their networks to the detriment of end use customers.

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[16] BellSouth Petition at pp. 27-29.

[17] 47 U.S.C. §160(b) provides: "In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest." **Here, forbearance will in no way promote competition among telecommunications providers or lead to additional DSL carriers on which ISPs can rely to provide high-speed Internet access to their end use customers.**

C. Anticompetitive Impacts Will Result if the FCC Grants Bell South's Petition.

BellSouth is requesting the freedom to configure its network and provision advanced services to customers in the manner it chooses and at the same time hide behind a regulatory shield from antitrust liability. This outcome is fundamentally inconsistent with common carrier regulation. Although BellSouth argues that it has every incentive to continue serving ISPs, this claim rings hollow.

In the past and at present, ILECs have demonstrated that they are willing to exclude independent ISPs from their networks. In 2001, California ISPs were presented with a contract by SBC that proposed to modify how SBC configured its DSL network. SBC proposed to deploy a network device—a Broadband Capabilities Gateway—that would permit SBC to infringe on bandwidth leased by an ISP. SBC attempted to retain the exclusive right to provide information services over that bandwidth. SBC informed ISPs that they either had to sign the contract or have their DSL service terminated. This act prompted litigation, which was resolved in large part because SBC withdrew its ultimatum.[18] Recently, an SBC representative stated that "If [SBC] is going to build the [Internet Protocol] pipe, we want all the revenue streams."[19] This statement reflects an ongoing intent to exclude independent ISPs from ILEC networks. The FCC must consider the anti-competitive results that will occur if its forebears from enforcing Title II common carriage requirements and *Computer Inquiry* rules as they apply to DSL and other advanced services.

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[18] *See*, CPUC Decisions 03-07-032 and 03-09-009 at 2001 Cal. PUC LEXIS 1232 and 2001 LEXIS Cal. PUC LEXIS 1252.

[19] See, Statement of Ralph Ballart Vice President of SBC Broadband Laboratories reported at http://news.com.com/Video+gamble+for+the+Bells/2100-1034_3-5457226.html?t

IV. CONCLUSION

BellSouth's request for regulatory forbearance is not reasonable and should be denied. If the FCC is to revisit the application of *Computer Inquiry* rules to DSL and other advanced services offered by ILECs, it should do so in a manner that establishes a wholesale model which permits local and independent ISPs to obtain access to ILECs' networks on a fair an nondiscriminatory basis, including fair and nondiscriminatory pricing and terms and conditions of service. The FCC should require ILECs to make DSL and other advanced services available in the same manner and at the same price to both affiliated and independent ISPs.

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Respectfully submitted

SIMPSON PARTNERS LLP
900 Front Street, Suite 300
San Francisco, California 94111
Tel. 415.773.1790
Fax 415.773.1791

Andrew Ulmer
Attorneys for the
California ISP Association, Inc.